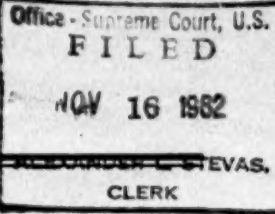


82-926



No.

IN THE
Supreme Court of the United States

NOVEMBER TERM, 1982

IN THE INTEREST OF C. AND K.,
Children.

On Appeal from the Supreme Court of Iowa

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Does Iowa Code Section 232.116(5), which requires a showing of harm to the children as a prerequisite to termination of parental rights, deny appellant substantive due process under the Fourteenth Amendment to the United States Constitution.

2. Does Iowa Code Section 232.116(6) which permits the trial court to withhold termination notwithstanding the State's proof by clear and convincing evidence, unconstitutionally shift the burden of proof of termination of parental rights proceedings from the State to the natural parents in violation of the Fourteenth Amendment to the United States Constitution.

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MOTION TO DISMISS

The Appellee - State of Iowa moves the Court to dismiss the appeal herein on the ground that the appeal from a state court does not present a substantial federal question, Rule 16.1(b).

STATEMENT OF THE CASE AND
STATE STATUTES INVOLVED

The statutes directly involved, Iowa Code Sections 232.116 (5) and (6) (1981), are set forth in full as Appendices D and E to the Jurisdictional Statement. Appellee believes, however, that a brief summary of the history of Iowa's juvenile justice statutes may be of assistance to the Court.

Until as recently as 1979, the juvenile laws of the State of Iowa have been subject to criticism of the same nature as has been directed at the juvenile justice system nationally. *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The state statutes provided only a skeletal framework for the legal process and practices which occurred in the juvenile court. Iowa Code Chapter 232 (1977).

However, as early as 1973, the Iowa Legislature initiated an inquiry into the juvenile statutes and embarked on an attempt at a comprehensive revision of the juvenile justice code. This legislative activity resulted in enactment of a new, comprehensive juvenile justice act. 1978 Iowa Acts, Chapter 1088, Section 1, *et. seq.* The act is now codified at Iowa Code Chapter 232 (1981).

The new act is based in large part upon the enlightened standards recently promulgated for juvenile justice systems. IJA/ABA Juvenile Justice Standards (Tent. draft 1977). The act, as now written, complies with each and every pronouncement of this Court relating to juvenile justice: *Santosky v. Kramer*, ___ U.S. ___, 102 S.Ct. ___, 71 L.Ed.2d 599 (1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981); *Fare v. Michael C.*, 444 U.S. 887, 100 S.Ct. 186, 62 L.Ed.2d 121 (1979); *Breed v. Jones*, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975); *McKiever v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 647, 29 L.Ed.2d 647 (1971); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Kent v. United States*, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). The Iowa Supreme Court and Iowa Court of Appeals, since July 1, 1979, the effective date of the statutes, have taken numerous opportunities to interpret, clarify and construe the act. *In Interest of C. and K.*, 322 N.W.2d 76 (Iowa 1982); *In Interest of Chad*, 318 N.W.2d 213 (Iowa 1982); *In Interest of A.R., K.R. and A.R.*, 316 N.W.2d 887 (Iowa 1982); *In Interest of J.R. and S.R.*, 315 N.W.2d 750 (Iowa 1982); *In Interest of Dameron*, 306 N.W.2d 743 (Iowa 1981); *State Ex Rel. Leas In Interest of O'Neal*, 303 N.W.2d 414 (Iowa 1981); *In Interest of Adkins*, 298 N.W.2d 273 (Iowa 1980) (Termination of Parental Rights); *In Interest of C.T.F.*, 316 N.W.2d 865 (Iowa 1982); *In Interest of C.D.P.*, 315 N.W.2d 731 (Iowa 1982); *In Interest of Harrell*, 309 N.W.2d 896 (Iowa App. 1981); *In Interest of Matzen*, 305 N.W.2d 479 (Iowa 1981) (Delinquency);

In Interest of Leehey, 317 N.W.2d 513 (Iowa App. 1982); *In Interest of Long*, 313 N.W.2d 473 (Iowa 1981); *In Interest of Driver*, 311 N.W.2d 87 (Iowa 1981); *In Interest of Blackledge*, 304 N.W.2d 209 (Iowa 1981); *In Interest of Wall*, 295 N.W.2d 455 (Iowa 1980); *In Interest of Hewitt*, 272 N.W.2d 852 (Iowa 1978) (Child in Need of Assistance - Formerly Neglect and Dependency).

It is the position of the State that the Iowa Courts have not paid mere lip service to the application of due process in juvenile proceedings, but have embraced and applied those concepts vigorously. In several areas, the Iowa Courts have extended rights beyond the pronouncements of this Court. *In Interest of C.T.F.*, 316 N.W.2d 865 (Iowa 1982) (constitutional right to speedy trial in delinquency proceedings); *In Interest of Harrell*, 309 N.W.2d 896 (Iowa App. 1981) (applies adult rule requirement of corroboration of accomplice testimony to juvenile delinquency proceedings); *In Interest of Wall*, 295 N.W.2d 455 (Iowa 1980) (declared legal ground of child in need of assistance unconstitutional as void for vagueness); *In Interest of Hewitt*, 272 N.W.2d 852 (Iowa 1978) (child in need of assistance adjudication reversed for lack of proper constitutionally required notice).

COURSE OF PROCEEDINGS

TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

This appeal by a natural mother comes from the order and judgment of the Iowa Supreme Court which judgment, upon de novo review of issues raised and preserved in the juvenile court, terminated the parent/child relationship between the appellant and her two children, C. and K.

Initially this cause of action was instituted by the filing in the Polk County, Iowa Juvenile Court of a Petition to Terminate Parental Rights. The Petition was filed on September 3, 1981 and alleged as a legal base Iowa Code Section 232.116(5) (1981). (Iowa S.Ct. App., at 4-6). That statute provides as follows:

232.116 Grounds for Termination. Except as provided in subsection 6, the court may order the termination of both the parental rights with respect to a child and the relationship between the parents and the child on any of the following grounds:

. . . 5. The court finds that:

a. The child has been adjudicated a child in need of assistance pursuant to section 232.96; and

b. The custody of the child has been transferred from his or her parents for placement pursuant to section 232.102 for at least twelve months; and

c. There is clear and convincing evidence that the child cannot be returned to the custody of his or her parents as provided in section 232.102.

Iowa Code Section 232.116(5) (1981).

The natural mother filed an answer to the Petition on September 11, 1981. (Iowa S.Ct. App., at 8). The answer admitted the allegations necessary for proof of Sections 232.116(5)(a) and (b). (Iowa S.Ct. App., at 9). She contested only the allegations of proof under Section 232.116(5)(c), that there was clear and convincing evidence that the children could not be returned to the custody of the natural mother because of a harm set out in Iowa Code Section 232.2(5) (1981). (Iowa S.Ct. App., at 9)

The trial court hearing on the termination petition was held on September 29, 30, October 9 and 26, 1981. (Iowa S.Ct. App., at 599-600). On December 21, 1981, the juvenile court filed its order and judgment which dismissed the petition as to the natural mother. (Iowa S.Ct. App., at 599-600). The court determined that the state failed to prove by clear and convincing evidence that the children could not be returned to the custody of appellee as provided in Section 232.102(6). (Iowa S.Ct. App., at 608).

Feeling aggrieved by the juvenile court order, the state appealed by filing Notice of Appeal on December 22, 1981. (Iowa S.Ct. App., at 609).

On July 21, 1982, the Iowa Supreme Court filed its decision which is set out in the Jurisdictional Statement at Appendix A. The decision reversed the lower court and held that the State proved by clear and convincing evidence that the children could not be returned to the custody of the natural mother. *In Interest of C. and K.*, 322 N.W.2d 76, 78-81 (Iowa 1982). The Iowa Supreme Court determined the continuing harm to be the natural mother's inability, despite assistance and training, to provide adequate food, clothing, shelter and sanitation for herself and the children, as well as, her lack of an intellectual functioning level necessary to provide the children with minimal supervision and protection. Iowa Code Sections 232.2(5)(c)(2) and (5)(g) (1981).

On July 21, 1982 the natural mother filed a Notice of Appeal to the United States Supreme Court. (Jurisdictional Statement, at 33).

PREVIOUS CHILD IN NEED OF ASSISTANCE PROCEEDINGS

Prior to the above-mentioned termination proceedings, these children were the subject of child-in-need-of-assistance proceedings (formerly neglect and dependency).

On September 26, 1980, both children were adjudicated in need of assistance; Katherine, D.O.B. March 24, 1979, under the legal base of Section 232.2(5)(b) and Christopher, D.O.B. August 10, 1978, by virtue of Sections 232.2(5)(b) and (g). (Iowa S.Ct. App., at 602). Legal custody was transferred to the Department of Social Services for purposes of foster care placement. (Iowa S.Ct. App., at 602). They remained in foster care until the time of termination hearing, September-October 1981. (Iowa S.Ct. App., at 602).

Between September 1980 and September 1981, the natural mother was afforded services and an opportunity to rehabilitate her parental skills to enable the children to return home. (Iowa S.Ct. App., at 633). Two contracts were executed between the mother and the Department of Social Services, setting out the conditions and expectations necessary for the return of the children to their parent. (Iowa S.Ct. App., at 604). The first was executed on October 31, 1980, with the second, more specific contract executed on January 16, 1981. (Iowa S.Ct. App., at 604).

A CHINA review hearing, mandated pursuant to Iowa Code Section 232.102(6) (1981), was held in April 1981. (Iowa S.Ct. App., at 203). It resulted in a continuation of the prior disposition and the children were not returned home.

On September 3, 1981, the petition to terminate parental rights was filed. (Iowa S.Ct. App., at 2). The filing was precipitated by the determination of various child care workers working with the family that the children could not be returned to the natural mother because of her continued inability to provide minimal food, clothing, shelter and sanitation for the children. Moreover, her continued lack of intellectual functioning rendered her unable to recognize and provide the children's base need for protection and supervision. Iowa Code Sections 232.2(5)(c)(2) and (5)(g).

FACTUAL STATEMENT

The hearing in the juvenile court on the Petition for Termination of Parental Rights occurred on September 29, 30 and October 9, and 26, 1981. (Iowa S.Ct. App., at 599-600).

The State's case consisted of the following testimony and evidence.

The appellant-state called as witnesses the following persons: Teresa King, juvenile probation officer (Iowa S.Ct. App., at 374-438); Connie Mitchell, Department of Social Services foster care worker (Iowa S.Ct. App., at 128-244); Janet Simmons, homemaker to the natural mother Cheryl (Iowa S.Ct. App., at 302-373); Celia Young, social worker at Polk County Mental Health who was a therapist to the natural mother Cheryl (Iowa S.Ct. App., at 91-127); Dr. Herbert Notch, clinical psychologist at Polk County Mental Health who conducted a psychological evaluation of the natural mother (Iowa S.Ct. App., at 23-65); Dr. Barbara Cavellin, clinical psychologist who attended Christopher (Iowa S.Ct. App., at 66-90); Linda Skeers, parenting skills instructor for the program attended by Cheryl, the natural mother (Iowa S.Ct. App., at 439-482).

The factual testimony revealed that appellant was afforded a myriad of services during the twelve month rehabilitation period. (Iowa S.Ct. App., at 379-383, 390-406). The natural mother was afforded services under, not one, but two parenting contracts delineating corrections needed for the children to be returned. (Iowa S.Ct. App., at 389-390). During the twelve month rehabilitation period her lack of personal hygiene failed to abate. (Iowa S.Ct. App., at 186-192). The many apartments in which she resided were similarly disheveled and unsanitary. (Iowa S.Ct. App., at 308-314). Between April 1981 and the termination hearing in September 1981, the natural mother lived in six different residences. (Iowa S.Ct. App., at 172). In one, she was without any utilities for two months. (Iowa S.Ct. App., at 314-315). Testimony of a clinical psychologist detailed his clinical findings that the natural mother suffered borderline intellectual functioning, including limited insight and impulse control, notable depression and bizarre ideation and histrionic disorder. (Iowa S.Ct. App., at 23-34). He opined a resulting inability to react to normal situations, a need for continuing supervision and a "guarded" prognosis of her child care ability. (Iowa S.Ct. App., at 34-41). Child care workers corroborated

her inability to recognize and react to the children's need for supervision and protection. (Iowa S.Ct. App., at 129-133, 318-319, 383-388).

Based upon this factual proof, the Iowa Supreme Court reversed the juvenile court and entered order and judgment terminating the parent/child relationship. *In Interest of C. and K.*, 322 N.W.2d 76 (Iowa 1982).

Throughout the totality of these proceedings, the natural mother has exercised her right to counsel, right to notice and opportunity to be heard, right to access of all juvenile court records, right to confrontation, cross-examination and compulsory process, and the right to require the state's proof by clear and convincing evidence in both child in need of assistance and termination proceedings. Iowa Code Sections 232.37, .87, .88, .89, .95, .96, .111, .112, .113, .117, .147 (1981).

ARGUMENT

1. Iowa Code Section 232.116(5) Which Allows Termination Of Parental Rights Upon A Showing That, A) The Children Were Previously Adjudicated Children In Need Of Assistance, B) The Children Had Remained Out Of Parental Custody In Foster Case In Excess Of Twelve Months And C) At The Time Of Termination Hearing There Exists Clear And Convincing Evidence The Children Cannot Be Returned To Parental Custody Because Of Continuing, Substantial Harm Which Supported The China Adjudication, Requires A Showing Of Continuing Substantial Harm To The Children As A Prerequisite To Termination Of The Parent-Child Relationship And The Statute Complies With Substantive Due Process Under The Fourteenth Amendment To The United States Constitution.

The appellant-natural mother alleges the Iowa termination statute, Iowa Code Section 232.116(5), formerly Iowa Code Section 232.114(5), denies her due process under the standard articulated in *Alsager v. District Court of Polk County, Iowa*, 406 F.Supp. 10, 21 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976). Although this Court has never decreed the *Alsager* standard as constitutionally required, the State assumes for the sake of argument that it has.

It is the position of the State that Iowa Code Section 232.116(5) was written to include the *Alsager* standard and, in fact, requires exactly what appellant claims it lacks; a high and substantial degree of harm to the children as a prerequisite to termination of the parent-child relationship.

In a decision of the Iowa Supreme Court previous to the instant appeal, the Court directly addressed the issue on the merits.

[11] Trial court correctly found the first two steps in a section 232.114(5), The Code 1979, analysis had been met. Chad was in fact adjudicated a child in need of assistance and had been placed out of Malinda's custody for more

than twelve months. However, the final prong of section 232.114(5) was not met. Section 232.114(5)(c), in keeping with the fundamental right to familial integrity mentioned in section 232.1, required the court to find, on the basis of clear and convincing evidence, that the child cannot be returned to the custody of his parents as provided in section 232.102.

[12] The reference to section 232.102 creates a burden of proof problem that we have recognized, but not previously resolved. See *In re Dameron*, 306 N.W.2d 743, 744, 747 n.4 (Iowa 1981); *In re Adkins*, 298 N.W.2d 273, 278 (Iowa 1980). The problem is that section 232.114(5)(c) requires clear and convincing proof that the child cannot be returned to the custody of the parents, whereas section 232.102(6) requires that temporary placement be terminated and the child returned to his home if the court finds, by a preponderance of the evidence, that the child will not suffer harm in the manner specified in section 232.2(5). See, e.g., *In re Blackledge*, 304 N.W.2d 909, 214-15 (Iowa 1981). We resolve this conflicting standard of proof problem by holding that in the termination of parental rights context, the clear and convincing standard of section 232.114(5) prevails and applies to the showing of harm required pursuant to section 232.2(5). In other words, before a termination of parental rights can occur under section 232.114(5), there must be clear and convincing proof that the child will suffer harm in the manner specified in section 232.2(5). This is the minimal burden of proof now required in this type of case by the due process clause of U.S. Const. amend. XIV. *Santosky v. Kramer*, ___ U.S. ___, ___, 102 S.Ct. 1388, ___, 71 L.Ed.2d ___, ___ (1982). (Emphasis added.)

In Interest of Chad, 318 N.W.2d 213, 219 (Iowa 1982) [Iowa Code Section 232.114(5) (1979) now found at Iowa Code Section 232.116(5) (1981)].

The high and substantial degree of harms required are found at Iowa Code Section 232.2(5) (1981). The statute is set out in full herein at Appendix A. As rewritten under Iowa's new Juvenile Justice Act, these harms are narrowly drawn and specifically define the prohibited conduct. *Compare* Iowa Code Section 232.2(5) (1981) with Iowa Code Section 232.2(13) (1977); *See, Wald, State Intervention on Behalf of Neglected Children: A Search for Realistic Standards*, 27 Stan.L.Rev. 985 (1975).

The State submits that Iowa Code Sections 232.116(5), 232.102(6) and 232.2(5) require the very showing of a high and substantial degree of harm to the children as a prerequisite to termination of parental rights. The Iowa Supreme Court has so found.

The issue raised by appellant fails to present a substantial federal question because the state statute requires exactly what appellant claims it should.

II. Iowa Code Section 232.116(6) Does Not Shift The Burden Of Proof In Termination Of Parental Rights Proceedings From The State To The Natural Parent But Allows The Court To Withhold A Termination Decree, Under Certain Circumstances, Notwithstanding The State's Proof By Clear And Convincing Evidence.

As a second attack upon the Iowa termination of parental rights statute, appellant alleges that Iowa Code Section 232.116(6) reverses the constitutionally required burden of proof upon the State and places it upon the natural parents in contravention of *Santosky v. Kramer*, ___ U.S. ___, 102 S.Ct. 1338, 71 L.Ed.2d 599 (1982).

The State contends that the statute does not in any fashion alter the burden of proof. The effect of the statute is to allow the juvenile court to withhold a termination decree, in certain

circumstances, even though the State has proven by clear and convincing evidence the three elements necessary for termination of parental rights.

Iowa Code Section 232.116(6) does not require the natural parents to come forward with proof of the circumstances enumerated in the provision. In fact, it may be the State's own evidence which allows the court in its discretion to withhold terminating the relationship of parent-child.

The Iowa Supreme Court addressed the appellant's proposition and rejected it.

Cheryl also contends that section 232.116(6) is unconstitutional on its face because she says, it unconstitutionally reverses the burden of proof. We deny that the statute does such a thing; it does not relieve the State of any burden. The burden of the State remained, and was borne throughout the proceedings, as required by the statute.

In Interest of C. and K., 322 N.W.2d 76, 81-82 (Iowa 1982).

Appellant's argument upon this issue fails to raise a substantial federal question.

QUESTIONS NOT PRESENTED

Appellant seeks to invoke the jurisdiction of this Court under Title 28, USC, Section 1257(2), where there is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution. The State would agree that ISSUES II and III of appellant's Questions Presented By Appeal are properly before this Court under Section 1257(2). (Jurisdictional Statement at 1).

The State would argue, however, ISSUES I and IV are not properly before this Court.

The appellant fails to cite any state statute as being repugnant to the Constitution.

The appellant, upon each of these questions, only generally alleges that in some fashion the termination proceedings in this matter violate due process.

In effect, appellant asks this Court for another factual review of the record. Upon that factual review, she would have this Court substitute its judgment for that of the Iowa Supreme Court.

It is the State's contention, that given the posture of this matter, ISSUES I and IV, identified by appellant, are not properly before this Court and, in any event, do not raise substantial federal questions.

CONCLUSION

On the basis of the foregoing authority and argument, the Appellee-State of Iowa moves this Court for an order dismissing this appeal.

Respectfully submitted,

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